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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/576,181	07/26/2006	Astrid Mauler-Machnik	CS8795/BCS033095	7330

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EXAMINER

BROOKS, KRISTIE LATRICE

ART UNIT	PAPER NUMBER
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1616

MAIL DATE	DELIVERY MODE
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03/25/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/576,181

Applicant(s)

MAULER-MACHNIK ET AL.

Examiner

KRISTIE L. BROOKS

Art Unit

1616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 April 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 9-15 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 9-15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SF/ICE)
Paper No(s)/Mail Date 4/19/06
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claim Objections

1. Claims 10-15 are objected to because of the following informalities:
typographical errors.

Applicant should change the capitalized "Claim" recited in the body of the claim to ---claim---. For example, claim 12 recites "The method of Claim 11." The word "Claim" followed by the word "method" should be changed to ---claim---.

Applicant recites "according to Claim 9" several times in the claim. It is already understood that the compound of formula (I), (II) and (III) is referring to the compounds recited in claim 9. The Examiner suggests removing the phrase.

Appropriate correction is required.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

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1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
3. Claims 9-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baron et al (US 6,884,798) in view of Jautelat et al (5,789,430).

Applicant claims an active compound combination comprising a compound of formula (i) (spiroxamine), formula (II) (prothioconazole), and formula(III) (tebuconazole).

Determination of the scope and content of the prior art
(MPEP 2141.01)

Baron et al. teach a synergistic novel active compound combinations comprising at least one active compound from groups (B) to (E) which include a triazole derivative (i.e. tebuconazole), and spiroxamine (see the abstract, column 1 lines 25-55 and column 2 lines 35-38). The combinations have very good fungicidal properties and may additionally comprise further fungicidally active co-components (see column 1 line 56 and column 2 lines 38-39). The ratio of active compounds in general is from 0.1 to 25 parts by weight of an active compound of component (B) tebuconazole and from 1 to 60 parts by weight of an active compound of component (E) spiroxamine (see column 2 lines 40-55). The active formulations generally comprise 0.1 to about 95% by weight of active compound (see column 4 lines 5-7). The active compound combinations can be used for foliar application, or seed dressings (see column 3 lines 1-7). The formulations

are produced by mixing the active compound combinations with extenders or surfactants (see column 3 lines 21-26).

Ascertainment of the difference between the prior art and the claims
(MPEP 2141.02)

Baron et al. do not teach the use of prothioconazole. This deficiency is cured by the teachings of Jautelat et al.

Jautelat et al. teach triazole derivatives of formula (I), such as prothioconazole, and their use as microbiocides in plant protection (see the abstract). The triazole derivatives have a powerful microbiocidal action that can be employed to control undesirable microorganisms preferably fungi (see column 29 lines 57-60 and column 31 lines 5-11). The active compounds are generally present in an amount between 0.1 and 95% by weight (see column 32 lines 21-23). The triazole derivatives can be formulated with other fungicidally active compounds to widen the spectrum of action or prevent the buildup of resistance, thus resulting in a synergistic effect (see column 32 lines 26-31). An example of a fungicide that can be used in the formulation is tebuconazole (see column 33 line 21). The active compound can be formulated solutions, emulsifiable concentrates, suspensions, powders, foams, etc (see column 34 lines 27-37).

Finding of prima facie obviousness
Rational and Motivation (MPEP 2142-2143)

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to incorporate prothioconazole into the instant formulation.

One of ordinary skill in the art would have been motivated to do this because Jautelat et al. suggests that prothioconazole has a powerful microbiocidal action against fungi and can provide synergistic effects when combined with other fungicides. Thus, it would have been obvious to incorporate prothioconazole into the formulation taught by Baron et al. to widen the spectrum of activity against the fungi and to prevent the buildup of resistance. Furthermore, it would have been obvious to one of ordinary skill in the art to combine two compounds each of which is taught by the prior art to be useful for the same purpose (*In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980)).

Although Baron et al. and Jautelat et al. do not teach the ratio of spiroxamine and prothioconazole, it would have been obvious to one of ordinary skill because Jautelat discloses 0.1 to 95% by weight of a triazole derivative that may be used to widen the spectrum of activity against fungi when used with other fungicides. Baron et al. also discloses using 0.1 to 95% by weight of active compounds in fungicidal formulations. Thus, it would have been obvious to utilize the ratios cited in the instant claims because the amount of actives cited in both prior art references are similar and encompass a very broad amount of actives that can be used in the formulations. Therefore, when utilizing the amounts of actives cited in both Baron et al. and Jautelat et al. the ratio does encompass the range cited in the instant claims. Therefore, the claimed invention

would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made because the prior art is fairly suggestive of the claimed invention.

Conclusion

4. No claims are allowed.
5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to KRISTIE L. BROOKS whose telephone number is (571)272-9072. The examiner can normally be reached on M-F 8:30am-6:00pm Est..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann R. Richter can be reached on (571) 272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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KB

/Sharmila Gollamudi Landau/
Primary Examiner, Art Unit 1611